Appendix

APPENDIX "A"

COREX CORP. d.b.a. Quick Corporation of America, Plaintiff,

v.

UNITED STATES of America, Defendant.

Civ. No. 72-1272-AAH.

United States District Court,

C. D. California.

June 28, 1973.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HAUK, District Judge.

FINDINGS OF FACT

1. The plaintiff at all times relevant was a resident of Orange County, State of California, and the Central District of California, and was conducting a wholesale jobbing and distribution business in the United States of fishing equipment under the name and style of Quick Corporation of America.

2. That defendant, United States of America, is a sovereign body politic.

3. That this is an action for refund of manufacturer's excise taxes imposed under Section 4161(a) of Title 26, United States Code, arising under Title 28 U.S.C. Section 1340 and 1346(a)(1).

4. That on or about March 20, 1972, defendant assessed against plaintiff a deficiency in excise tax in the sum of $1,232.41 for the period ended September 30, 1968, and interest in the sum of $250.13.

5. That on or about April 25, 1972, plaintiff paid the defendant the assessment in the sum of $1,232.41, and interest to May 1, 1972, in the amount of $258.81, making a total of $1,491.22.

6. That on or about May 5, 1972, plaintiff duly filed a claim for refund of said $1,491.22, which claim was disallowed on or about May 24, 1972, by notice dated May 24, 1972.

7. That Jon H. Importing Company was a sole proprietorship owned by Ruth Marie Nessley, of Cypress, California, and acted independently of plaintiff, who did not invest in, direct, or control the operations in any shape or form, financial, economic, business policy, or otherwise, of Jon H. Importing Company.

8. That on or about October 7, 1968, plaintiff and Jon H. Importing Company, two resident citizens of the United States, entered into a written contract which recited that Jon H. Importing Company had been appointed the exclusive importers of D.A.M. fishing products. and appointed Quick Corporation of America (plaintiff) as sole distributor in the United

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States, Hawaii, Alaska, Virgin Islands, and Puerto Rico. The contract provided, among other things, that plaintiff shall have the first option to purchase all of said D.A.M. fishing products imported by Jon H. Importing Company, at prices on the basis of CIF, duty, and excise taxes, paid Los Angeles harbor or Customs bonded warehouse based on shipment by ocean vessel. In the event of air shipments, air freight costs will be added to the invoices, along with delivery charges from airport to Costa Mesa.

9. That all dealings between plaintiff and Jon H. Importing Company were sales by Jon H. Importing Company, as the importer, to plaintiff, who purchased as a distributor. All of said sales to plaintiff by Jon H. Importing Company were arms length transactions.

10. That all of the business dealings between plaintiff and Jon H. Importing Company were that of principal and principal, and not principal and agent.

11. That Jon H. Importing Company did not act as agent for plaintiff, but was the principal for itself, only, in importing the taxable articles into the United States.

12. That the taxable articles upon which the manufacturer's excise tax was assessed therein, arrived at the port of Los Angeles at various times between August 1, 1968, and December 30, 1969, and were unloaded at the port of Los Angeles in accordance with the sea- and air-bills of lading.

13. That all of the special Customs invoices were prepared and issued by Anton W. C. Denker, the exporter and seller of the taxable articles to Jon H. Importing Company, and showed that Jon H. Importing Company was the purchaser thereof.

14. That all bills of lading issued by the sea- and air-carriers were made to the order of the shipper, to-wit: Anton W. C. Denker, and showed party to be notified as Jon H. Importing Company.

15. That all carriers' certificates and release orders certified to whom, or upon whose order, the articles described therein must be released, as being Jon H. Importing Company, of Cypress, California, the owner or consignee of such articles within the purview of Section 484(h), Tariff Act of 1930. The Release orders directed to the Collector of Customs provided that, in accordance with the provisions of Section 484 (j), Tariff Act of 1930, authority is hereby given to release the articles covered by the carrier's certificate to Jon H. Importing Company.

16. That all of the consumption and warehouse entries for the taxable articles showed Jon H. Importing Company as the importer of record.

17. That plaintiff was not named in any of the documents of improtation of the taxable articles, nor was it involved in any manner in the importation thereof.

18. That all applications to the Bureau of Customs

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for immediate delivery permits were made for Jon H. Importing Company by Edward S. Zerwekh Company, its attorney-in-fact.

19. That all the original non-negotiable warehouse recipts were in the name of Jon H. Importing Company, who was the owner of the taxable articles which were delivered on the order of Jon H. Importing Company to plaintiff after having been withdrawn from the bonded warehouse by Jon H. Importing Company.

20. That the taxable articles were cleared through Customs and were withdrawn from Customs or Customs' bonded warehouses by Edward S. Zerwekh Company, Customs brokers, who acted solely as agent of Jon H. Importing Company, the importer, the party who sold the taxable articles to plaintiff at a profit either ex dock or ex warehouse if the taxable articles went through a Customs bonded warehouse.

21. That plaintiff did not withdraw any taxable articles from a Customs bonded warehouse, nor was it entitled to do so.

22. That plaintiff did not intend to, and did not, take possession and title to the taxable articles until after they had been cleared through Customs, and either released from Customs' custody or from a Customs bonded warehouse.

23. That Jon H. Importing Company's payments of the premiums on the term bond, insurance, excise taxes, Customs duties, brokerage fees, warehousing, CF

price, wharfing, payment of goods, and all other expenses of importation on the taxable articles were all bona fide.

24. Except as specifically found herein, none of the allegations of defendant's answer and counterclaim is true.

CONCLUSIONS OF LAW

1. That this Court has jurisdiction of the parties and of the subject-matter of this action.

[1] 2. The term [importer], as used in Section 4161(a) of Title 26, United States Code, is the person who arranges [as principal, and not as agent] for the goods to be brought into the United States.

[2] The plaintiff did not, as a principal, arrange for, induce, or cause, the taxable articles to be brought into a port of the United States with intent to unload. Neither did it actually import the taxable articles.

4. That neither plaintiff, nor his agent, withdrew the taxable articles from a Customs bonded warehouse.

5. The plaintiff never had any interest or title in the taxable articles until after they had been cleared and released from Customs custody or withdrawn from a Customs bonded warehouse, and title to the taxable articles did not pass to plaintiff until after it received delivery and possession thereof, which was after release from Customs custody or withdrawal from a Customs bonded warehouse. Rev.Rul. 56-409, 1956 Cum.

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Bull. 796, and West's Ann.U.C.C. §2401 (2) (3) (a).

6. That the first sale of the taxable articles in geographic United States was made by Jon H. Importing Company, upon which it made a profit and paid the excise taxes due thereon.

7. That plaintiff was not the importer of the taxable articles within the meaning of 26 U.S.C. §4161.

8. It follows that the manufacturer's excise taxes in question were illegally and erroneously assessed against, imposed upon, and paid by plaintiff.

9. Plaintiff is entitled to recover from defendant the sum of $1,491.22, with interest thereon at the rate of six percent (6%) per annum from April 25, 1972, until paid, in accordance with the terms and provisions of Section 6611 of the United States Code Title 26, together with costs.

10. The Counterclaim is hereby dismissed on its merits on the ground that defendant is not entitled to a judgment thereon.

The foregoing Findings of Facts and Conclusions of Law are hereby approved as to form.

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APPENDIX "B"

COREX CORP. d.b.a. Quick Corporation
Plaintiff-Appellee,
v.
UNITED STATES of America,
Defendant-Appellant.

No. 73-3332.

United States Court of Appeals,
Ninth Circuit.

Oct. 7, 1975.

Before: CARTER, HUFSTEDLER and GOODWIN, Circuit Judges. JAMES M. CARTER, Circuit Judge.

This appeal involves a refund suit brought by the Corex Corporation ("Corex") for money paid pursuant to an excise tax assessment under Section 4161 of the Internal Revenue Code of 1954, 26 U.S.C. §4161. The United States brought a counterclaim for other unpaid excise taxes. Section 4161 imposes upon the sale of fishing gear by the manufacturer, producer, or importer a tax equivalent to ten percent of the price for which it is sold by the taxpayer.

Following a nonjury trial, findings of fact and conclusions of law were entered in favor of the taxpayer.

The issue on appeal is whether the appellee coux or anather firm, Jon H. Importing Company ("Jon H."). was the "importer" subject to the tax. We reverse.

"Quick" brand fishing reels and supplies were manufactured in West Germany by Deutsche Angelgerate Manufaktur ("D.A.M.") and exported to the United States and Canada by Anton W. C. Denker ("Denker"), an export firm located in West Germany. During the years in issue D.A.M. was owned by Rupert and Lotz Kuntz with their mother, Annelisa Kuntz. In July, 1965, Rupert and Lotz, together with Philip Greyshock (a former representative for D.A.M.) incorporated Corex in Califonia, for the purpose of importing fishing equipment and sporting goods. Corex began operations as the exclusive importer of D.A.M. fishing reels and supplies.

Between 1965 and the summer of 1968 Corex continued as the importer. The Gladding Corporation ("Gladding"), a separate and unrelated entity, was the distributor. In June, 1968, Denker (exporter) and Corex (importer) decided to terminate the distribution activities of Gladding. Corex assumed the distribution activities and a new entity, Jon H., was established to take over Corex's importing function. The role of Corex in the formation of Jon H. remains unclear.

Jon H. was an incorporated association owned by Ruth Nessley and operated by her husband John. John Nessley was also an active officer in the Edward Zer-

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wekh Company ("Zerwekh") a customs brokerage firm. Jon H. had $1000 in capital assets. Following formation, Denker named Jon H. the "exclusive importer" of D.A.M. products and Jon H. designated Corex as the "sole distributor". Authough Jon H. could designate another distributor if Corex failed to exercise its option, during the years relevant to this suit Corex received all supplies "imported" by Jon H.

Transactions between Denker, Jon H. and Corex would begin when Denker prepared and sent its invoice, a special customs invoice, and a packing list of the shipment, to Jon H. Copies were sent to Zerwekh. Jon H. would notify Corex, which in turn sent to Jon H. its (Corex's) purchase order for the entire shipment. Jon H. then prepared and sent its purchase order to Denker.

Zerwekh, the brokerage firm, handled most of the details related to the physical importation of D.A.M. products. Zerwekh arranged for the customs entry (declared the value and duty rates, and submitted documents to Customs officials), caused the merchandise to be released from Customs, arranged for the delivery to Corex, and paid all expenses (including import duties, freight and docking charges, and insurance) and billed Jon H.

To finance the importation Denker extended credit, which was unsecured, to Jon H. for the entire amount of the purchase. Jon H. extended an equal amount of credit to Corex, but Jon H. did require an advance

payment of a portion of its invoice. The advance payment roughly equalled the expenses Jon H. incurred through Zerwekh. Jon H. paid its importation expenses upon receiving Corex's advance payment.

Other than the advance payments used to pay importation expenses, Jon H. did not receive any payments from Corex during the first eight months of the relationship. During the same period Jon H. made no payments to Denker. In April, 1969, Corex finally began making substantial payments to Jon H.; immediately Jon H. would forward the same amount to Denker.

Jon H. received a profit averaging only 1% of sales, about $13,000 for 1968 and 1969. The small profit resulted, according to the plaintiff, from the need to keep its selling price low so that Quick products could be priced competitively. The services for which Jon H. received the profit, in addition to forwarding payment to Zerwekh and Denker, were activities of "promotion": one allowance of $354 was granted to Corex in an attempt to promote the sales of spools with line, Nessley once recommended to Corex that it make a greater effort with respect to its retail outlets, and Nessley sugggested to Corex that small reels, rods, and lines be offered together as an inexpensive package.

The trial judge held that the dealings were sales by Jon H., as the importer, to Corex, who purchased as a distributor. The sales were found to be arms-length transactions and Jon H. was held to be acting as

a principal and not as agent for Corex.

The appellant contends that the trial court erred by placing undue emphasis upon the formalities of the transactions: that Denker's customs invoice, carriers' certificates, and bills of lading showed Jon H. as the purchaser or the party to be notified; that the customs release orders named Jon H. as the importer of record; and that Corex was not named in any of the documents and did not take title until the merchandise was delivered to Corex's possession. The Judge's findings were silent on (1) the capitalization of Jon H., (2) how importation was actually financed, (3) who first dealt with the exporter, (4) what ties existed between appellee and the manufacturer, and (5) whether Jon H. served a purpose other than procuring appelee's orders.

In this appeal this court is not bound by a misapplication of law to the evidentiary findings by the court below. *United States v. Armature Rewinding Co.*, 124 F.2d 589 (8 Cir. 1942). To determine if a misapplication has occurred we must identify the relevant test and ascertain if the trial court properly applied the test.

The determination of who is the importer subject to tax has been undertaken only rarely. The major cases are *Import Wholesalers Corp.* v. *United States*, 368 F.2d 577 (Ct. Cl. 1966) and *Sony Corp. of America* v. *United States*, 428 F.2d 1258 (Ct. Cl. 1970). According to *Import*,

> "... the determination of who is the 'importer'

under the pertinent statute does not turn on technical rules such as the law of sale, but rather on the realities as to who arranges as principal and not as agent for the articles to be imported into the United States." 368 F.2d at 583.

In *Import* the court held that the paintiff, a Volkswagen dealer, was the actual "importer", rather than the Deeren Trading Corporation ("Deeren") as contended by the plaintiff, although Deeren had entered the chain of tite and was named in the import documents. The evidence in *Import* showed that one Kirkiles, with two others, decided to enter the car business in Miami, Florida. They formed the plaintiff corporation and established credit with a local bank. Kirkiles approached a friend, Petrides, and suggested that the latter take over and incorporate the Deerden Trading Co. in New York. Deeren had no assets.

Subsequently Deeren, as seller, and plaintiff, as purchaser, entered into a written agreement whereby plaintiff agreed to purchase from Deeren between 100 and 300 cars per month for a competitive market price (which included the invoice cost and all importation expenses) plus $5 for each automobile. All expenses were to be paid by plaintiff and the $5 per car was to be paid directly to Deeren.

The court held that the "overall substance of the importation" was that the formalities were, as a matter of fact, subordinate to the supply by plaintiff of all funds necessary to accomplish the importation. Deer-

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en had no credit and supplied none of the funds, and was paid an insufficient sum for assuming any risk. Deeren's only act was to place plaintiff's orders with the seller. The court concluded that the plaintiff was the "inducing and efficient cause" of the importation, and therefore was the importer. 368 F.2d at 585.

On similar, but not identical, facts in *Sony,* a different result was reached. The evidence showed that Sony of Tokyo ("Sony T"), desiring to stimulate sales in the United States, entered into a sales agency agreement with one Gross, a noted entrepeneur. Sony T also designated the Agrod Corp. ("Agrod"), owned by Gross, as exclusive distributor. Agrod initially subdistributed to Delmonic International Corporation; Delmonic was later replaced by Sony of America ("Sony A"). Sony T controlled Sony A.

The usual practice was that Sony A placed an order with Agrod, and Agrod then ordered from Sony T. Sony A opened an assignable letter of credit in Agrod's favor, which Agrod immediately assigned to Sony T. Agrod arranged to deliver or store the merchandise and Agrod made all other payments (freight, customs, insurance, and bonds).

The court held that Agrod was the importer. Agrod functioned as an importer: it had extensive knowledge of the United States market, advised Sony T as to which vessels to use for shipment, selected a national advertising agency, and continuously promoted Sony products. Agrod's employees, "highly knowledge-

able" in the business, were active in relationships with distributors of other products. Finally, the fact that Agrod was the importer before the existence of Sony A illustrated that the dealings between Sony A, Agrod, and Sony T were bona fide.

In comparison to *Import* and *Sony* the district court in this case did not pursue an in depth examination of the substance of the relations between the parties. The court did not mention the following facts, most of which were undisputed:

1. Corex was owned by D.A.M., the manufacturer, and was the importer initially.

2. Jon H. had no other clients. Nessley, operator of Jon H., was a full time customs broker for Zerwekh.

3. Jon H. was established for the purpose of performing Corex's importing function.

4. Jon H. had minimal assets and was paid a small commission.

5. Unsecured credit was extended by Denker to Jon H. All brokerage fees were paid by funds provided by Corex.

6. Jon H. performed minimal promotional activities.

The trial court did not pursue an inquiry into the substance of the transactions, as required by *Import* and *Sony*. A careful weighing of all the factors was necessary; a mere recitation of the contract formalities

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was insufficient. Applying *Import* and *Sony,* Jon H. was not the importer: Jon H. did not perform substantial promotional activities, Jon H. bore none of the usual risks, performed no function other than as a conduit, and earned little profit.[1]

REVERSED.

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[1] *See* Revenue Ruling 67-209, 1967-1 Cum. Bull. 179. This ruling gives a hypothetical case which is similar to this action: X, a foreign corporation, and Y, a subidiary marketing X's products in the United States, arranged with Z for importation. Z is an unrelated corporation. Z is required to deliver all of X's products to Y.

Y submits an order to Z, who forwards the order to X. All documents show Z to be the importer. Y pays Z's brokerage expenses, X's invoice price, plus a 2% "profit" for Z. Z is not an importer because he doesn't assume any of the risks of a typical merchant importer.